



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: GITHINJI, J.A. (IN CHAMBERS))**  
**CIVIL APPLICATION NO. NAI. 192 OF 2010**

**BETWEEN**

**TOM LUKALO .....APPLICANT**

**AND**

**BEATRICE LUKALO .....1<sup>ST</sup> RESPONDENT**  
**MARGARET OSOLIKA .....2<sup>ND</sup> RESPONDENT**

**(Application for extension of time to lodge an appeal out of time from the ruling and order of the High Court of Kenya**

**at Kakamega (Chitembwe, J.) dated 15<sup>th</sup> October, 2009**

**in**

**H.C. SUCC. CAUSE NO. 408 OF 1998)**

\*\*\*\*\*

**RULING**

This is an application under **Rule 4** of the *Court of Appeal Rules* for leave to file and serve a notice of appeal and record of appeal out of time.

The application relates to the estate of Ezekiel Lukalo Aluda who died on 2<sup>nd</sup> March, 1996. According to the affidavit of the applicant sworn on 27<sup>th</sup> January, 1997 in support of chamber summons dated 27<sup>th</sup> January, 1997 for revocation of the grant of letters of administration, the deceased had three wives, namely, **Selina Lukalo** (1<sup>st</sup> wife) who had three sons including the applicant; **Josephine Lukalo** (2<sup>nd</sup> wife) who had 10 children including **Beatrice Lukalo** and **Margaret Osolika Ndombi**, who are the administrators of the estate of the deceased and the respondents in this application, **Tabitha Shivachi** (3<sup>rd</sup> wife) who had two daughters. In that affidavit the applicant complains that the petitioners had not disclosed in the inventories of assets that the deceased owned a farm plot 272 Kisatiru comprising 12 acres which he transferred to the 2<sup>nd</sup> wife during his life; that the deceased also transferred plot No. 204 measuring 5 acres to **Charles Lukalo** and his wife during the deceased's life time and that the deceased also transfer a house Nairobi/Block 75/295 Buruburu Estate to Margaret Osolika and her husband for no consideration. That application was dismissed for non-attendance and a subsequent application to set

aside the dismissal order and reinstatement of the dismissed application was also dismissed on 17<sup>th</sup> December, 2004. After the dismissal of the application the applicant sought leave to appeal. It is not clear whether the application was allowed or not. By an application dated 24<sup>th</sup> October, 2005, the applicant applied for revocation of the confirmed grant made on 29<sup>th</sup> October, 1999 on the grounds that all persons interested in the estate were not informed and that some interested parties were disinherited.

In the supporting affidavit the applicant averred, among other things, that he was not served to attend court for the hearing of the application for the confirmation of the grant; that he has been struggling ever since to get a share from his father's estate in vain; that the parcel of land given to him and his brother were not registered in the deceased's father's name and that the administrators of the estate had disinherited him and his brother.

The certificate of the confirmation of the Grant dated 29<sup>th</sup> October, 1999 shows, among other things, that the applicant and his brother Douglas Lukalo were allocated land parcel No. N. Maragoli/Kisatiru/471. The certificate of official search dated 15<sup>th</sup> January, 2002 however, shows that the proprietor of the land as from 7<sup>th</sup> April, 1970 is Marko Mbaizi Sasia. The applicant deposes in the affidavit to support the application, among other things, that the time within which to lodge the notice of appeal had lapsed by the time he received the proceedings; that delay in lodging the notice of appeal was not deliberate and that dispute involves the distribution of his father's estate in which he and his brothers were unjustly shut out and that the stands to suffer loss if the application is not granted.

The latter application was dismissed by Chitembe, J. on 15<sup>th</sup> October, 2009. Thereafter, the applicant applied for leave to appeal which was granted on 23<sup>rd</sup> October, 2009. The applicant intends to appeal against the order dismissing the application to revoke the confirmation of the grant. The applicable principles in an application for extension of time are well known. I have perused the impugned ruling of Chitembwe, J. and the grounds of the intended appeal contained in the draft memorandum of appeal. I have also considered the nature of the dispute. The applicant has already obtained leave to appeal. This is a case where members of the first house of the deceased claim that they have been totally been disinherited and that the second house of the deceased has been given a disproportionate share of the estate. I am satisfied that the intended appeal is arguable.

I have taken into account that this application was filed nine months after leave to appeal was granted. Although this inordinate delay has not been satisfactorily explained, the Court nevertheless has discretion to allow the application. I have taken into account that the applicant has been seeking a chance to be heard for a long time and the dispute on the distribution of the estate has not been heard on the merits. The respondent do not claim that they or the other beneficiaries would suffer undue prejudice if the application is allowed. I am satisfied that the applicant would suffer loss if the application is not allowed.

In the light of the foregoing, I allow the application with costs in the appeal.

The applicant to file and serve a notice of appeal within 7 days from the date hereof.

Further the applicant to serve and file a record of appeal within 21 days from date of service of the notice of appeal.

**Dated and delivered at Kisumu this 13<sup>th</sup> day of April, 2011.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**